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[*Nichols v. Bechtel Construction Inc.*, 87-ERA-44 \(Sec'y Nov. 18, 1993\)](#)
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DATE: November 18, 1993
CASE NO. 87-ERA-0044

IN THE MATTER OF

ROY EDWARD NICHOLS,

COMPLAINANT,

v.

BECHTEL CONSTRUCTION, INC. [1]

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

Before me for review is the May 4, 1993, Recommended Decision on Remand (R.D.R.) of the Administrative Law Judge (ALJ) in this case arising under the employee protection provision of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988).

In an earlier decision issued October 26, 1992, [2] the Secretary found that Respondent Bechtel Construction violated the ERA when it laid off Complainant Nichols on April 30, 1987. The Secretary remanded the case to the ALJ for further proceedings to establish the complete remedy.

Relevant factual findings from the remand decision are set forth to focus the discussion.

I. *Facts*

Nichols worked as a carpenter at the Turkey Point nuclear facility from 1984 until he was laid off on April 30, 1987. Remand Decision (Rem. Dec.) at 2-3. [3] Prior to March 1987, Nichols was assigned to the crew of foreman Greg Lilge and worked

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outside the containment (radiologically hot) area. T. 233-289; Rem. Dec. at 3. That month, Bechtel needed a great number of craft workers to work in the containment area because of outages in two units. T. 339; Rem. Dec. at 3. Bechtel formed an additional crew of carpenters to work inside the containment area and named John Wright the foreman. T. 338-340; Rem. Dec. at 3.

Carpenters' general foreman Larry Williams told foreman Lilge to name a carpenter to be transferred to Wright's new crew, and Lilge asked Williams to take Nichols. T. 342; Rem. Dec. at 3. Lilge testified that for about six months, he had been having "an attitude problem" with Nichols. T. 290; Rem. Dec. at 3. Lilge stated that a few weeks prior to suggesting Nichols for transfer to the new crew, he had recommended that Nichols be laid off in the next reduction in force. T. 290, 342-343; Rem. Dec. at 3.

Williams told Nichols that it was "more than likely" that he would return to Lilge's crew when the outages were over. T. 345; Rem. Dec. at 4. Williams testified at the hearing, however, that he did not tell Nichols the whole truth, and that at the time the crew was formed, Williams believed that all of Wright's crew would be laid off at the end of the outages. T. 344-346; Rem. Dec. at 4.

While assigned to Wright's crew, Nichols questioned the procedure Wright told the workers to use for surveying and tagging tools contaminated with radiation and persisted in bringing the issue to others for resolution. Rem. Dec. at 4-5.

Bechtel does not use seniority in layoffs. When it is time to reduce the number of workers at the Turkey Point plant, the general foreman asks craft foremen to recommend particular workers for layoff. T. 364-365; Rem. Dec. at 6. Toward the end of the outages at issue, Williams told foreman Wright to select one of the carpenters on his crew for layoff as part of an ongoing reduction in force. T. 366-367; Rem. Dec. at 6. Wright initially named a worker who had been absent from work, but then changed his mind and selected Nichols. T. 366-367, 461-462; Rem. Dec. at 6. When Wright informed Williams that Nichols would be the first worker laid off from the crew, Williams asked Wright if he was sure about the choice. T. 367; Rem. Dec. at 6. During the month following Nichols' layoff, Wright's entire crew was laid off except for Wright, who was transferred back to being a laborer on his former crew. T. 44; Rem. Dec. at 7.

II. The Remand Decision

The Secretary found that Nichols' questioning of the safety procedure Wright used was "tantamount to a complaint that the correct safety procedure was not being observed" and constituted protected activity under the ERA. Rem. Dec. at 10. The Secretary further found that the reasons Bechtel gave for

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selecting Nichols "as the first carpenter to be laid off from Wright's crew were not believable, and . . . [Nichols] has sustained the burden of persuasion that the real reason for his selection was his protected activity." Rem. Dec. at 17. She therefore found that Bechtel violated the ERA when it selected Nichols for layoff. *Id.* The Secretary ordered Bechtel to offer Nichols reinstatement to the same or a similar position, to pay the back pay to which he is entitled, and to pay the costs and expenses in bringing the complaint, including an attorney fee. Noting that the record did not include the evidence needed to calculate the back pay owed to Nichols, the Secretary remanded to the ALJ for proceedings to establish the complete remedy. *Id.* at 18.

III. Proceedings on Remand

On the date of the scheduled hearing on remand, Bechtel requested a 30 day continuance to permit it to obtain documentation from Nichols concerning his activities and earnings since the 1987 layoff. RT. 8-10. The ALJ granted the request. RT. 20-21. During the 30 day interval, the ALJ granted Bechtel's motion to shorten the time to respond to its interrogatories and request for production of documents, Order of Feb. 12, 1993, and also granted the subsequent emergency motion to compel Nichols to answer the propounded interrogatories and to submit to a deposition prior to the date for the continued hearing. Order of Feb. 17, 1993. Nichols did not submit to the deposition and provided answers to the interrogatories after the start of the continued hearing on February 18, 1993. At the end of the continued hearing, the ALJ left the record open for 30 days to permit the submission of relevant documents. RT. 89.

Within 30 days, Bechtel submitted a Memorandum on Back Pay Determination (Back Pay Memo) supported by a number of documents. It also moved the admission of a number of affidavits, or in the alternative, asked that the hearing be reopened to allow it to present witnesses and documentary evidence. The ALJ declined to admit the affidavits because they were submitted post-hearing and Nichols would not have had the opportunity to cross-examine the affiants. Order of Apr. 16, 1993 at 3. Although the requested reopening of the hearing would have permitted cross-examination, the ALJ declined it because of the Secretary's direction to complete the remand proceedings expeditiously. *Id.* at 4.

IV. Recommended Decision on Remand

The ALJ found that Bechtel would have laid off Nichols no later than May 30, 1987, the day the final employee on Wright's crew was laid off as the outages ended. R.D.R. at 4. To calculate the back pay owed for the month of May 1987, the ALJ computed the average monthly wage Nichols earned during the double outages in 1987. *Id.* Pursuant to Nichols' stipulation

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at the hearing, RT. 18, the ALJ deducted the amount of unemployment compensation that Nichols received for the month. R.D.R. at 5. He found that Bechtel owed Nichols \$3,222.37, plus interest calculated pursuant to 16 U.S.C. § 6621 (1988).

The ALJ noted that a few of the other employees on Wright's crew that were laid off shortly after Nichols were later rehired for a period, but found that there was not sufficient evidence to establish the number of straight time and overtime hours the rehired employees worked. R.D.R. at 5. Accordingly, the ALJ found that Nichols did not meet his burden of establishing how much he would have earned during a period of reemployment at Bechtel. *Id.*

The ALJ did not mention Nichols' request for payment of medical and related costs and an attorney fee. The ALJ denied as moot Bechtel's motion for reconsideration of the earlier Order denying the admission of affidavit testimony or the reopening of the hearing. R.D.R. at 6. See RT. 20.

The parties filed briefs before me concerning the R.D.R.

V. Renewed Motion to Admit Affidavits or Reopen Hearing

Bechtel again seeks the admission of the affidavit testimony it submitted after the hearing, or in the alternative, for reopening to permit the taking of additional testimony. Resp. Br. at 10-13. I recognize that the Secretary's earlier admonition to proceed expeditiously on remand resulted in a lack of sufficient time either to conduct discovery or to reopen the hearing after it closed.

I find that the late-tendered affidavits and evidence are not necessary to decide the issues on remand and I have not relied upon them. In view of Bechtel's lack of opportunity for discovery and inability to depose Nichols prior to the hearing on remand, I will admit Bechtel's post-hearing affidavits and evidence into the record. [4]

VI. *The Remedy*

A. Reinstatement

The ERA's employee protection section provides that if the Secretary finds that a violation occurred, he shall order the violator to "reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment. . . ." 42 U.S.C. § 5851(b)(2)(B). The Secretary ordered reinstatement in the remand decision, and Nichols continues to seek it. RT. 72.

Although the Secretary found that Nichols was a permanent employee prior to his 1987 layoff, that finding does not resolve the issue of his entitlement to reinstatement. See, e.g., *Blackburn v. Metric Constructors, Inc.*, Case No. 86-ERA-4, Dec. and Order on Damages, etc., Oct. 30, 1991, slip op. at 20, (reinstatement not appropriate for employee who would have been

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laid off for legitimate reasons); *rev'd on other grounds, Blackburn v. Martin*, 982 F.2d 125 (4th Cir. 1992). As it may no longer be appropriate to order that Bechtel reinstate Nichols, I will examine the issue.

On remand, the ALJ determined that Nichols would have been laid off no later than May 30, 1987, and I agree. As of that date, all of the crew to which Nichols was assigned had been laid off except for foreman Wright, who returned to his prior position as a laborer on a different crew. R.D.R. at 3.

It is possible, of course, that as a permanent worker, Nichols might have been entitled to return to his prior crew when Wright's crew was laid off. The record reveals otherwise, however. Foreman Greg Lilge believed that Nichols had exhibited an "attitude problem" for about six months prior to Nichols' transfer to Wright's new crew. T. 290, 292. Lilge explained that:

[t]his change, it was the way he was responding when I told him to do things. He would get upset with me, or angry, or try and tell me how to do the job. At that point, I had determined about a month before . . . I transferred [Nichols] over to the other crew, when Larry [Wright] asked me for a man . . . I was going to lay [Nichols] off the next lay off. I knew that it would eventually come, because of his attitude.

T. 290. Williams corroborated Lilge's testimony, T. 343, and no

one controverted it.

When Williams formed the new crew and transferred Nichols to it, he expected that Nichols would be laid off with the rest of the crew at the end of the outages. T. 344-346. As the ALJ found, R.D.R. at 4, the transfer to Wright's crew gave Nichols the status of a worker who was hired to work the outages. I find that at the time Bechtel formed the new crew, which was prior to the time Nichols engaged in protected activity, Nichols already was slated for layoff when Wright's crew disbanded for lack of work. I therefore find that it is no longer appropriate to order that Bechtel reinstate Nichols. See, *Blackburn*, slip op. at 20.

B. Back pay

The purpose of a back pay award is to make the employee whole by restoring the employee to the same position he would have been in if not discriminated against. *Blackburn*, slip op. at 11 and cases there cited. Therefore back pay awards are based on the earnings the employee would have received but for the discrimination. *Id.* Thus, when an employee who was laid off for discriminatory reasons nevertheless would have been laid off for legitimate reasons, back pay would be cut off at the point of the legitimate layoff. See *Blake v. Hatfield Electric Co.*, Case No.

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87-ERA-4, Dec. and Rem. Ord., Jan. 22, 1992, slip op. at 14.

Nichols' selection for layoff that was tainted by a discriminatory reason was effective April 30, 1987. He would have been laid off in any event some time during the month of May as Wright's crew was dismantled. Uncertainties in determining what a complainant would have earned absent discrimination are resolved against the discriminating employer. *Adams v. Coastal Production Operators, Inc.*, Case No. 89-ERA-3, Dec. and Ord. of Rem., Aug. 5, 1992, slip op. at 16 and cases there cited; *Lederhaus v. Donald Paschen, et al.*, Case No. 91-ERA-13, Dec. and Order, Oct. 16, 1992, slip op. at 10. I agree with the ALJ, R.D.R. at 4, that Nichols is entitled to the presumption that he would have been the last worker laid off from Wright's crew, effective May 30. I therefore agree with the ALJ that Nichols is entitled to one month's back pay. R.D.R. at 5.

Since Nichols' pay fluctuated with the amount of overtime available, another uncertainty is the amount he would have earned in May 1987. Bechtel argues that back pay should be based on the average amount Nichols earned during his entire employment at Turkey Point, from 1984 to 1987. Back Pay Memo at 19. Those years included lengthy periods when there was no outage and consequently little overtime available. *Id.* at 18. But as Bechtel conceded, in the first third of 1987, there were outages in two units, "hours were long and overtime was common." *Id.* I therefore agree that in projecting what Nichols would have earned during the final month of his employment during the 1987 outage, Nichols is entitled to the benefit of the overtime pay that accompanied the longer hours during outages. The ALJ took Nichols' pay for January through April 1987 (CX 1, 1987 W-2 form) and divided by four to derive an average monthly wage in 1987. R.D.R. at 5. I agree that the resulting amount (\$3,638.00) satisfactorily reflects the amount Nichols would have

earned in May 1987.

I agree that Nichols did not provide sufficient evidence to determine how much he would have earned if he had been recalled to work at Turkey Point, as happened to some other members of Wright's crew who were laid off shortly after Nichols. See R.D.R. at 5. In any event, Nichols could not have been recalled after he allowed his union membership to lapse. See RX 1.

The Secretary normally does not deduct unemployment compensation from a back pay award. See, e.g., *Williams v. TIW Fabrication & Machining, Inc.*, Case No. 88-SWD-3, Dec. and Order, June 24, 1992, slip op. at 12-13. In this case, however, Nichols stipulated that the amount of unemployment compensation benefits he received would be deducted from the back pay award. RT. 18. Absent a provision in a stipulation which might be contrary to public policy, a stipulation is like a settlement or a contract

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and the parties should be held to their bargain. *Goldstein v. Ebasco Constructors, Inc.*, Case No. 86-ERA-36, Dec. and Order, Apr. 7, 1992, slip op. at 17, rev'd on other grounds, *Ebasco Constructors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 19, 1993); see also, *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1206 (7th Cir. 1989) (stipulation binding unless relief from stipulation necessary to prevent manifest injustice, or stipulation entered into through inadvertence or based on erroneous view of facts or law).

Nichols has not sought relief from his stipulation. I find that the stipulation to deduct unemployment benefits is not so contrary to public policy as to warrant nonenforcement of the stipulation in this case. Therefore, the ALJ correctly deducted unemployment compensation of \$415.63 [5] from the back pay award for the month of May 1987, for a total of \$3,222.37. R.D.R. at 5. I also affirm the award of prejudgment interest on back pay at the rate specified in 26 U.S.C. § 6621. R.D.R. at 5.

C. Medical benefits

Nichols claimed entitlement to reimbursement of medical and prescription drug expenses for the years 1987 through 1992. RT. 18; CX 8. Although Nichols initially claimed that he lost his health insurance when Bechtel laid him off, RT. 18, he later testified that, through the union to which he belonged, his benefits continued until "somewhere around [19]88." RT. 37. Nichols testified that he was suspended from the union late in 1988 for nonpayment of dues. RT. 57. Bechtel submitted union documents showing that Nichols was suspended in March 1989. RX 1. On cross-examination, Nichols admitted that the claimed medical expenses for 1987, 1988, and a portion of 1989 may have been paid by the union.

Since Nichols would have been laid off anyway by May 30, 1987, and the union continued Nichols' health insurance through that month, Bechtel does not owe payment of any health related expenses.

D. Attorney fee

Nichols submitted into evidence the fee agreement he had with his attorney in this case, which provided that Nichols would

pay all costs and expenses, a guaranteed retainer of \$15,000 payable in advance for the first 60 hours, and \$250 per hour for each hour of work in excess of 60 hours. CX 6 p. 1. Counsel explained that Hurricane Andrew destroyed the time records for the work he performed prior to the remand. RT. 19. Accordingly, Nichols seeks a payment of \$15,000 as full reimbursement of attorney fee and costs, and is waiving entitlement to all hours of work performed by counsel in excess of 60. Request for Attorney's Fee at p. 2 par. 4. To support his claim to the \$15,000 fee, counsel attached to the fee request his time records

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showing 40 hours of work on this case after the remand. Request for Attorney's Fee at Ex. 1. Bechtel did not dispute the \$15,000 fee.

I find that \$15,000 is a reasonable attorney fee for the representation of Nichols in this matter.

ORDER

Accordingly, it is ORDERED that:

1. Respondent pay Complainant the sum of \$3222.37 in back pay (including overtime) for the period April 30 through May 30, 1987, with interest thereon calculated in accordance with 26 U.S.C. § 6621 (1988).

2. Respondent pay attorney Arthur W. Tifford the sum of \$15,000.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The name of Bechtel Construction, Inc. has changed to Bechtel Construction Company. For purposes of consistency with earlier decisions, the former name is retained in the caption of this case.

[2] An Errata Order issued on October 30, 1992 corrected the October 26 decision.

[3] Nichols was laid off for a period of about seven weeks in the summer of 1985. RT. 53 (reference is to the transcript of the 1993 hearing on remand). "T." refers to the transcript of the 1988 hearing.

[4] Bechtel's Memorandum on Back Pay Determination ("Back Pay Memo") submitted after the hearing, appears to be the post-

hearing submission that the ALJ authorized. I have now accepted into the record on remand the following documents attached to Bechtel's Back Pay Memo:

1. Bechtel Journeyman Carpenter Wage Scale for 1986 through 1993.
2. Bechtel craft layoff list April 10, 1987 through June 26, 1987.
3. Wright's crew daily time sheets for April 1, 1987 through June 1, 1987.
4. Crew personnel files for members of Wright's crew and chart of reemployment of that crew at Bechtel after May 30, 1987.
5. Carpenters' Union Local No. 125 records concerning Nichols.
6. Specified pages of the November 5, 1987, hearing transcript in this case. (I note that the entire transcript of the original hearing in this case is already part of the record).
7. Financial statements for New Beginning Cabinetry, Inc. for the year ending December 31, 1992.
8. Affidavits of David E. Shanteau, Larry Williams, William D. Callahan, David E. Biddle, Myron Solomon, John B. Reid, and Paul Cyman.
9. W-2 Statements for Nichols for 1984 through 1987.

In addition, the following documents also submitted post-hearing are accepted into the record:

1. Affidavit of Ibrahin Leon.
2. Affidavit of J. Kenneth Lipner and attachments.
3. Nichols payroll records from 1986 and 1987.

The tendered notice of filing of Nichols' medical records does not include any attached medical records. Accordingly, the medical records are not accepted into the record of this case.

[5] The total amount of unemployment compensation listed on Nichols' 1987 income tax return, \$3325, (CX 1) divided by the eight months he was unemployed that year, yields a monthly amount of \$415.63.